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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KEITH THOMAS, Defendant and Appellant.	D056958 (Super. Ct. No. SCD221955)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Judge. Affirmed as modified.

Keith Thomas, an inmate at the County of San Diego Central Jail, appeals his conviction of battery by gassing a peace officer in a detention facility. Thomas claims the trial court erred in failing to instruct the jury sua sponte on the offense of simple battery as a lesser included offense to battery by gassing a peace officer in a detention facility. He also asserts the trial court incorrectly calculated his presentence custody credits. We modify the judgment to reflect the correct number of presentence custody credits and affirm in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

On July 9, 2009, Sheriff's Deputy John Valente was escorting nurse Jennifer Marquez on her daily rounds to administer medications to inmates. After Deputy Valente unlocked the food flap in Thomas's door, Thomas threw two milk cartons full of what appeared to be urine through the flap. The contents of the first carton hit both individuals, but the contents of the second carton hit only Deputy Valente, with some of the urine landing on his exposed arm.

Subsequent testing of the clothing worn by Deputy Valente and Marquez was inconclusive for the presence of urine, meaning the presence of urine could not be definitely identified or ruled out. Nonetheless, both individuals recognized the urine smell coming from their clothes after the incident, and Marquez described the liquid that pooled on her cart as light yellow in color.

Thomas, who represented himself at trial, testified in his own defense. He claimed that he had thrown a single milk carton of water, and denied telling an investigator after the incident that he had been keeping a mixture of urine and water in a cup. On rebuttal, the investigator who interviewed Thomas after the incident testified that Thomas told him about saving urine and water in a cup.

A jury found Thomas guilty of battery by gassing. In a bifurcated proceeding, the jury found that Thomas had been convicted of seven prior strike offenses, and had served three prior prison terms. The trial court sentenced him to 25 years to life plus three years, in state prison. Thomas appeals.

DISCUSSION

I. *Instruction on Lesser Included Offense*

During trial, the court inquired as to whether simple battery was a lesser included offense of battery by gassing. At the jury instruction conference, the court concluded it had no duty to instruct on simple battery as a lesser included offense because the nature of the substance being thrown distinguished the offenses.

Thomas contends the trial court erred in failing to instruct the jury sua sponte on the lesser included offense of simple battery. He asserts the record contains substantial evidence that would absolve him of battery by gassing, but justify conviction of the lesser included offense of battery. We agree that the trial court erred in instructing the jury, but find the error to be harmless.

In criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) "The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given." (*People v. Sedeno* (1974) 10 Cal.3d 703, 716, overruled on other grounds in *Breverman*, at pp. 149, 165, & *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.) A lesser offense is necessarily included in the charged offense if it meets either the "'elements' test" or the "'accusatory pleading' test." (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) "Under the 'elements' test, we look strictly to the statutory elements, not to the specific facts of a given case. [Citation.] We inquire whether all the statutory elements of the lesser

offense are included within those of the greater offense." (*People v. Ramirez* (2009) 45 Cal.4th 980, 985.)

When a defendant is charged with battery by gassing, the prosecution must prove: (1) the defendant was confined in a local detention facility; (2) while so confined, the defendant intentionally threw "human excrement or other bodily fluids or bodily substances or any mixture containing human excrement or other bodily fluids or bodily substances" on the body of a peace officer of the local detention facility; and (3) the substance or mixture actually made contact with the skin of the peace officer. (Pen. Code, § 243.9, subd. (b); see CALCRIM No. 2722.) (Undesignated statutory references are to the Penal Code.) To show a simple battery, the prosecution must prove the defendant willfully, directly or indirectly, touched an individual in a harmful or offensive manner, with or without causing injury. (§ 242 [defining battery as the "willful and unlawful use of force or violence upon the person of another"]; see CALCRIM No. 960.) The crime of battery by gassing cannot be committed without also committing a simple battery. Thus, under the elements test, a simple battery is a lesser included offense of battery by gassing.

The People attempt to avoid this inescapable conclusion by arguing that because Thomas was an inmate and Deputy Valente was a peace officer, the *only* crime Thomas could have been charged with is battery by gassing because throwing water on someone does not constitute a simple battery. We reject this assertion because any harmful or offensive touching constitutes a battery. (*People v. Martinez* (1970) 3 Cal.App.3d 886, 889.) The touching need not be direct; rather, a battery can be committed by "any

forcible contact brought about by an object or substance thrown or launched or set in motion by a defendant," including water. (*Inter-Insurance Exchange v. Lopez* (1965) 238 Cal.App.2d 441, 445; Rest.2d Torts, § 18, com. c, p. 31 [a person may be liable for a battery "if he throws a substance, such as water, upon the other"].)

We now turn to whether the trial court erred by not sua sponte instructing the jury on the lesser included offense. "[T]he sua sponte duty to instruct on a lesser included offense arises if there is substantial evidence the defendant is guilty of the lesser offense, but not the charged offense. [Citation.]" (*Breverman*, *supra*, 19 Cal.4th at p. 177.) "In deciding whether evidence is 'substantial' in this context, a court determines only its bare legal sufficiency, not its weight. [Citations.]" (*Ibid*.) Here, Thomas's own testimony and the inconclusive test results for the presence of urine constituted substantial evidence from which the jury could have concluded that Thomas was guilty of battery, but not battery by gassing, because he threw water on Deputy Valente. Accordingly, the trial court erred by not instructing the jury on the lesser included offense of simple battery.

Nonetheless, a trial court's failure to instruct sua sponte on all lesser included offenses that are supported by the evidence "is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome. [Citations.]" (*Breverman*, *supra*, 19 Cal.4th at p. 165.) We focus "not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so

comparatively weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Id*. at p. 177.)

Given the inconclusive test results for the presence of urine on the victims' clothing, this case became one of credibility regarding the nature of the substance thrown. The prosecution presented strong evidence regarding the substance, including: (1) Deputy Valente's and nurse Marquez's testimony that they knew what urine smelled like, and the substance smelled like urine; (2) Marquez's testimony that the substance that landed on her cart was light yellow in color; and (3) the investigator's testimony that after the incident Thomas admitted he had been saving a mixture of urine and water in a cup.

In contrast, other than the inconclusive test results that could have resulted from diluted urine, the only other evidence regarding the nature of the substance was Thomas's own testimony that he threw "pure" water. Although two inmates housed nearby testified on Thomas's behalf, neither inmate testified regarding the color of the substance thrown, or whether they smelled urine after the incident. Therefore, the absence of the instruction on simple battery was harmless.

II. *Custody Credits*

On July 9, 2009, the date of the incident, Thomas was in custody pending trial in another case for threatening a parole agent (the threats case). (All further dates are in 2009.) Thomas was arraigned for the instant case on July 30. After his conviction for the instant case, the District Attorney dismissed the earlier threats case against Thomas. The trial court applied Thomas's July 30 arraignment date as his initial confinement date in this case, and the date of sentencing (March 4) as the release date, to award him 218 days

of actual credit and 108 days of conduct credits (§ 4019), for a total of 326 days' credit for presentence credits. The trial court later denied Thomas's request that it recalculate his credits starting from July 9, reasoning that Thomas's custody was not attributable to the gassing charge until his arraignment.

Thomas asserts the trial court misinterpreted section 2900.5 when it calculated his presentence custody credits beginning on his July 30 arraignment date, not July 9, the date of the incident. We agree.

Persons who remain in custody prior to sentencing receive credit against their prison terms for all days spent in custody prior to sentencing, so long as the presentence custody is attributable to the conduct that led to the conviction. (§ 2900.5.) Section 2900.5 provides that a defendant shall receive credit for all days served in custody, including both the day of arrest and the day of sentencing. (*People v. Browning* (1991) 233 Cal.App.3d 1410, 1412.) This statute, however, "'does not authorize credit where the pending proceeding has no effect whatever upon a defendant's liberty.'" (*People v. Wiley* (1994) 25 Cal.App.4th 159, 165.) Application of section 2900.5 "is clear when the conduct that led to the conviction and sentence was the sole cause of the custody to be credited. But difficult problems arise when, as often happens, the custody for which credit is sought had multiple, unrelated causes." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1180 (*Bruner*).)

On July 9, Thomas's custody was attributable to both the instant case and the threats case. Upon the dismissal of the threats case, the sole cause of Thomas's loss of liberty was the instant case, and that loss of liberty started on July 9. Using Thomas's

July 30 arraignment date to calculate custody credits results in "'dead time'" between July 9 and July 30 for which Thomas improperly received no benefit. (*In re Marquez* (2003) 30 Cal.4th 14, 20.) The Attorney General relies on the "strict causation" rule, which prohibits custody being "credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a 'but for' cause of the earlier restraint." (*Bruner*, *supra*, 9 Cal.4th at p. 1194.) However, the strict causation rule does not apply where the inmate is not seeking duplicate credits. (*In re Marquez*, *supra*, 30 Cal.4th at p. 23.) As the Attorney General concedes, this is not a situation where Thomas is seeking or receiving double credits.

Accordingly, we conclude that Thomas is entitled to custody credit of 239 days actual credit and conduct credits of 118 days (§ 4019), for a total of 357 days of presentence custody credit for time served.

DISPOSITION

The judgment is modified to give Thomas 357 days of presentence custody credit, consisting of 239 days of custody credit and 118 days of conduct credit. The clerk of the superior court is directed to prepare an amended abstract of judgment and

forward a copy to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

McINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.